No. 20-1075

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GORSS MOTELS, INC., BAIS YAAKOV OF SPRING VALLEY,
ROGER H. KAYE, and ROGER H. KAYE MD PC,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR RESPONDENTS FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA IN OPPOSITION

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INTRODUCTION

The U.S. Court of Appeals for the District of Columbia Circuit invalidated the FCC's Solicited Fax Rule, 47 C.F.R. § 64.1200(a)(4)(iv) (2019), holding that the rule exceeded the Commission's statutory authority under the Telephone Consumer Protection Act of 1991 ("TCPA"). *See Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078, 1083 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 1043 (2018) ("*Bais Yaakov*"). That judgment was an exercise of "exclusive jurisdiction" under the Administrative Orders Review Act (the "Hobbs Act") to review FCC orders. 28 U.S.C. § 2342(1). Following

the Solicited Fax Rule's invalidation, the FCC repealed the rule. Petitioners now ask this Court to rule that the repeal was erroneous. But because the D.C. Circuit held the rule invalid, the FCC's repeal of the rule was entirely reasonable—indeed, the agency had no basis to retain the rule after the D.C. Circuit's decision. The Court should deny the petition for review.

JURISDICTION

The FCC has authority to promulgate regulations implementing the TCPA under 47 U.S.C. § 227(b)(2). The Commission issued the final order repealing the Solicited Fax Rule on March 17, 2020 (SA055), and Petitioners timely sought review of that order on March 25, 2020 (A933–49). *See* 28 U.S.C. § 2344. This Court has jurisdiction to review the final order under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1), and venue is proper under 28 U.S.C. § 2343.

ISSUES PRESENTED FOR REVIEW

1. Whether this Court can declare that the FCC's Solicited Fax Rule is valid, despite the D.C. Circuit's exercise of exclusive jurisdiction under the Hobbs Act to declare the rule substantively invalid?

2. Whether the FCC erred by repealing a rule that the D.C. Circuit declared substantively invalid under the Hobbs Act's comprehensive judicial review mechanism?

3. Whether the rule's invalidation and repeal moots challenges to waivers of its provisions?

STATUTES AND REGULATIONS

Pertinent statutes and regulations are reprinted in an addendum to this brief.

COUNTERSTATEMENT

A. Statutory Framework

1. Congress enacted the TCPA to curb abusive telemarketing practices, including by means of facsimile ("fax") communications. Among other things, the TCPA "proscribes sending unsolicited advertisements to fax machines." *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 373 (2012) (citing 47 U.S.C. § 227(b)(1)(C)). An "unsolicited advertisement" is one "transmitted to any person without that person's prior express invitation or permission." 47 U.S.C. § 227(a)(5). The TCPA also "directs the Federal Communications Commission . . . to prescribe implementing regulations," *Mims*, 565 U.S. at 371, including for the prohibition on unsolicited fax advertisements. 47 U.S.C. § 227(b)(2).

The TCPA includes significant penalties for non-compliance. The FCC can pursue civil forfeiture for violations, *id*. § 227(b)(4); state attorneys general may bring suits on behalf of their states' residents, *id.* § 227(g)(1); and—especially relevant here—the TCPA creates a private right of action for

violations of the statute "or the regulations prescribed" by the FCC, *id.* § 227(b)(3). TCPA civil liability includes the "greater" of "actual monetary loss" or "$500 in damages for each violation," with the potential for treble damages for knowing or willful violations. *Id*.

2. In the Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359, Congress amended the TCPA's ban on unsolicited fax advertisements. As amended, the TCPA allows unsolicited fax advertisements if the sender has "an established business relationship with the recipient," obtains the recipient's fax number through certain specified means, and includes an opt-out "notice" on the fax. 47 U.S.C. § 227(b)(1)(C)(i)-(iii). The opt-out notice must be "clear and conspicuous," appear "on the first page of the unsolicited advertisement," inform the recipient of the right to opt out of "any future unsolicited advertisements," and provide a contact number and cost-free means to opt out. *Id*. § 227(b)(2)(D). The statute does not require a comparable opt-out notice for solicited fax advertisements—i.e., those a consumer consented to receive.

B. The FCC's Solicited Fax Rule

In 2006, the FCC adopted implementing regulations for the Junk Fax Prevention Act. *See* Report and Order and Third Order on Reconsideration, *Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, 21 FCC Rcd 3787 (2006) ("*Junk Fax*

Order"). That order clarified that a fax is not "unsolicited" if the recipient had consented to receive faxes from the sender in the past and not revoked that permission by sending an opt-out request. *See id*. at 3812 ¶ 46.

To assist consumers with revoking their previously granted permission to receive faxes, the *Junk Fax Order* also required that *solicited* fax advertisements include an opt-out notice like the one required for unsolicited fax advertisements. *Ibid*. at ¶ 48. As codified, this rule (the "Solicited Fax Rule" or "Rule") provided that "[a] facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice" meeting the same standards are required for unsolicited fax advertisements. 47 C.F.R. § 64.1200(a)(4)(iv) (2019).[1] No party sought judicial review of the Rule.

C. The FCC's 2014 Reaffirmation Of The Rule

The Solicited Fax Rule led to a wave of class action lawsuits against fax senders. These cases generally alleged TCPA liability for failure to include compliant opt-out notices on solicited fax advertisements in violation of the Rule. *See, e.g.*, *Nack v. Walburg*, 715 F.3d 680, 682 (8th Cir. 2013) (describing

[1] The order on review in this case repealed the cited provision from the Code of Federal Regulations. All citations to this provision are to the version of the Code in effect immediately prior to the repeal, and that version is reprinted in the addendum to this brief.

one such suit). Petitioners here are among the many putative class action plaintiffs who sought damages under the TCPA for violations of the Rule.[2]

Faced with significant potential liability, several class action defendants from cases across the nation turned to the FCC for relief. *See generally* Order, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission's Opt-Out Requirement for Faxes Sent with the Recipient's Prior Express Permission*, 29 FCC Rcd 13998 (2014) ("*2014 Order*"). Several of these defendants asked the Commission for a declaratory ruling that the FCC lacked statutory authority for the Solicited Fax Rule, *id*. at 14002–03 ¶ 10, or, in the alternative, for waivers that would retroactively excuse them from compliance with the Rule's requirements, *id*. at 14003 ¶ 11.[3] Other parties petitioned the Commission to go further and initiate rulemaking to repeal the Rule altogether. *Ibid.* at ¶ 12.

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[2] *See, e.g.*, *Kaye v. Merck & Co., Inc.*, 2020 WL 1492794, at *6 (D. Conn. Mar. 27, 2020); *Gorss Motels, Inc. v. Otis Elevator Co.*, 422 F. Supp. 3d 487, 497–502 (D. Conn. 2019); *Bais Yaakov of Spring Valley v. Educ. Testing Serv.*, 251 F. Supp. 3d 724, 725 (S.D.N.Y. 2017).

[3] The Commission's rules permit a waiver of substantive requirements on a showing of good cause. *See* 47 C.F.R. § 1.3; *accord Prayze FM v. FCC*, 214 F.3d 245, 249 (2d Cir. 2000).

The Commission issued a series of public notices and requests for comment on the issues raised. *Id*. at 14004 ¶ 13 & n.47. These notices and requests asked (1) whether "the Commission lacked the statutory authority to adopt the [Solicited Fax Rule]," (2) whether the Commission should grant retroactive waivers from compliance, and (3) whether to "initiate a rulemaking to repeal section 64.1200(a)([4])(iv)," the codified Rule. 29 FCC Rcd 1015, 1016 (Jan. 31, 2014).[4]

After considering the comments filed, the Commission reaffirmed its authority to adopt the Solicited Fax Rule under the TCPA's general grant of authority to prescribe implementing regulations. *2014 Order*, 29 FCC Rcd at 14006 ¶ 19. The Commission concluded that the Rule permissibly filled a statutory gap: Congress had not defined what it means to send a fax advertisement without "prior express invitation or permission," 47 U.S.C. § 227(a)(5), and consumers had a right to revoke previously granted permission. *2014 Order*, 29 FCC Rcd at 14006 ¶ 19. The Commission reasoned that the Rule afforded consumers an ongoing opportunity to revoke

[4] The FCC also issued seven additional notices and requests for comment relating to other petitions seeking comparable relief. *See* 29 FCC Rcd 3191, 3191–92 (Mar. 28, 2014); 29 FCC Rcd 4121, 4121–22 (Apr. 25, 2014); 29 FCC Rcd 5810, 5810–11 (May 30, 2014); 29 FCC Rcd 7833, 7833 (June 27, 2014); 29 FCC Rcd 9173, 9173–74 (July 25, 2014); 29 FCC Rcd 10410, 10410–11 (Aug. 29, 2014); 29 FCC Rcd 11504, 11504–05 (Sept. 26, 2014).

their consent if they had previously given permission to receive fax advertisements. *Id*. at 14006–08 ¶ 20. On that same rationale, the Commission also denied the petitions for rulemaking to repeal the Rule. *See id*. at 14013 ¶ 35.

Nonetheless, the Commission granted retroactive waivers from compliance with the Rule. *Ibid.* at ¶ 36. The Commission first noted that the *Junk Fax Order* contained a potentially confusing footnote suggesting that the Commission intended to apply the opt-out notice requirement only to unsolicited fax advertisements. *See id*. at 14009–11 ¶¶ 24, 27. The Commission also acknowledged that its Notice of Proposed Rulemaking, while "adequate to satisfy the requirements of the Administrative Procedure Act, . . . did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient." *Id*. at 14009–10 ¶ 25. The Commission concluded that "this specific combination of factors" established good cause to waive compliance retroactively, because these factors "led to confusion or misplaced confidence" about the Solicited Fax Rule's applicability. *Id.* at 14010 ¶ 26. The Commission nonetheless specified that full compliance with the Rule was "expected" within six months, *id*. at 14011 ¶ 29, and thus waived compliance

with the Rule for several entities only through April 30, 2015. *Id.* at 14013 ¶ 36.

D. The D.C. Circuit's *Bais Yaakov* Decision

Several parties petitioned for judicial review of the *2014 Order*. Various class action plaintiffs—including three of the Petitioners here—challenged the FCC's grant of retroactive waivers and defended the Solicited Fax Rule. Meanwhile, several class action defendants challenged the Commission's refusal to invalidate and repeal the Rule. They argued that the FCC "acted arbitrarily and capriciously, and otherwise not in accordance with law" by concluding that the TCPA authorized the Rule and by "refusing to initiate a rulemaking proceeding to repeal the Solicited Fax Rule." *See, e.g.*, Petition for Review, *Staples, Inc. v. FCC*, No. 14-1302, at 6 (D.C. Cir. Dec. 29, 2014). The petitions were assigned to the D.C. Circuit under 28 U.S.C. § 2112(a)(3), which requires "consolidating the petitions for review" in a single court of appeals. (A775–76).

In *Bais Yaakov*, a divided panel of the D.C. Circuit invalidated the *2014 Order* and held "that the FCC's 2006 Solicited Fax Rule is unlawful to the extent that it requires opt-out notices on solicited faxes." 852 F.3d at 1083. The court concluded that the TCPA neither requires opt-out notices for solicited fax advertisements nor "grant[s] the FCC authority to require opt-out

notices on solicited fax advertisements." *Id.* at 1082. Rather, "Congress drew a line in the text of the statute between unsolicited fax advertisements and solicited fax advertisements," with opt-out notices required only for the former. *Id*. Although the FCC can "reasonably provide, as it has, that a recipient may revoke previously granted permission by sending a request to the sender," that authority does not extend so far as to allow the FCC to require an opt-out notice on all fax advertisements. *Id*. In short, the D.C. Circuit held that the Solicited Fax Rule was inconsistent with the choice Congress made to subject *only* unsolicited fax advertisements to the opt-out requirements. *See id.* Because the *2014 Order* "interpreted and applied" the Rule, the court vacated the *2014 Order* and remanded for further proceedings. *Id*. at 1083. And because "the FCC's Solicited Fax Rule is unlawful," the court dismissed as moot the petitions challenging the retroactive waivers of compliance. *Id*. at 1083 n.2.

Several of the class action plaintiffs, including Petitioners Bais Yaakov of Spring Valley and Roger H. Kaye, petitioned the Supreme Court for certiorari. The petition was denied. 138 S. Ct. 1043 (2018) (Mem.).

E. The Order On Review

After the D.C. Circuit's decision in *Bais Yaakov* became final, the FCC's Consumer and Governmental Affairs Bureau issued an order repealing the Solicited Fax Rule. *See* Order, *Rules and Regulations Implementing the*

Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005, 33 FCC Rcd 11179 (CGB 2018) (SA048). The Bureau explained that there was "good cause to eliminate the rule without notice and comment because the rule has been vacated by the court in an order that has become final and nonreviewable." *Id*. at 11183 ¶ 9 (SA052). The Bureau accordingly amended its rules to eliminate 47 C.F.R. § 64.1200(a)(4)(iv), which had codified the Rule. *See id.* at 11184–85 ¶ 11, Appendix (SA053–54).

On review, the full Commission affirmed the Bureau's action. *See* Order, *Rules and Regulations Implementing the Telephone Consumer Protection Act; Petitions for Reconsideration and/or Declaratory Ruling and Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv) Regarding the Commission's Opt-Out Notice Requirement for Faxes Sent with the Recipient's Prior Express Permission*, FCC 20-29, 2020 WL 1278412 (2020) ("*Repeal Order*") (SA055–61). The Commission first noted that the D.C. Circuit held the Solicited Fax Rule unlawful and then found that "allowing an unlawful rule to remain in the [Code of Federal Regulations ('CFR')] serves no public interest and would instead create unnecessary confusion and consternation as stakeholders could not use the CFR to know what the law is without also being aware of and understanding the significance of the *Bais Yaakov* decision." *Id*. at ¶ 11 (SA058).

The Commission rejected the argument that the D.C. Circuit "did not and could not vacate the Solicited Fax Rule because the only decision on review" was the *2014 Order*, not the 2006 Solicited Fax Rule itself. *Id*. at ¶ 12 (SA058–59). For support, the Commission cited rulings by the Sixth and Ninth Circuits, which held that *Bais Yaakov* invalidated the underlying Rule nationwide. *See ibid.* (citing *True Health Chiropractic, Inc. v. McKesson Corp.*, 896 F.3d 923 (9th Cir. 2018), and *Sandusky Wellness Ctr. v. ASD Specialty Healthcare*, 863 F.3d 460 (6th Cir. 2017)) (SA058–59). Indeed, as the Commission explained, settled precedent allowed the D.C. Circuit to pass on the Rule's validity because the *2014 Order* was a "serious, substantive reconsideration" of the Rule. *See id*. at ¶ 13 (SA059). Finally, the Commission concluded that the D.C. Circuit's mandate in *Bais Yaakov* required repealing the Rule. *Id*. at ¶¶ 14–15 (SA059–60).

Because the D.C. Circuit held that the Rule exceeded the Commission's statutory authority—and therefore never created a lawful obligation—the Commission dismissed as moot applications challenging retroactive waivers of compliance with the Rule, including those filed by the Petitioners here. *Id*. at ¶¶ 16, 18 (SA060–61).

This petition for review followed. (A933–49).

SUMMARY OF ARGUMENT

The Commission lawfully repealed the invalid Solicited Fax Rule and dismissed as moot Petitioners' applications for review of retroactive waivers of compliance with the Rule. The petition for review should be denied.

I. The D.C. Circuit's invalidation of the Solicited Fax Rule forecloses Petitioners' request that this Court hold the Rule valid. (Br. 36, 47–48). The D.C. Circuit decided *Bais Yaakov* on a pre-enforcement petition for review of an order that reaffirmed the Solicited Fax Rule after the Commission substantively reconsidered the Rule. Under the Hobbs Act, the D.C. Circuit had "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" the Commission's reaffirmation of the Rule. 28 U.S.C. § 2342(1). Because the D.C. Circuit invalidated the Rule using its "exclusive jurisdiction," *id*., other courts of appeals cannot now determine that the rule is valid.

II. The FCC acted properly by repealing the Rule after the D.C. Circuit invalidated it.

First, the Commission was correct that *Bais Yaakov* invalidated the Rule nationwide. Thus, the Commission reasonably concluded that repeal was appropriate.

Second, the necessary import of the D.C. Circuit's mandate required the Commission to repeal the Rule. One of the prevailing parties in *Bais Yaakov* had petitioned the Commission to repeal the Rule and challenged as arbitrary and capricious the agency's refusal to do so. Because that party prevailed, the D.C. Circuit's mandate required initiating the rulemaking and foreclosed the Commission from reconsidering the Rule's validity. Petitioners have not challenged this independent and sufficient basis for the *Repeal Order*, and they forfeit any right to do so in their reply.

Third, in any event, the Commission repealed the Rule for the sensible reason that three federal courts of appeals, including the D.C. Circuit on direct review, had held the Rule substantively invalid.

Finally, the repeal was not impermissibly retroactive. Because the Rule was unlawful when promulgated, it was a legal nullity for the entirety of its existence. The Rule's repeal simply implemented the D.C. Circuit's determination that the agency lacked authority to adopt the Rule in the first place. Petitioners do not contend that retroactivity is an issue where, as here, the underlying rule is invalid. (Br. 48–49).

III. Because the Rule was invalid from the start, the Commission was correct that any dispute over retroactive waivers of compliance is moot. At a

minimum, the Court should not reverse the waivers without affording the Commission an opportunity to consider the merits.

STANDARD OF REVIEW

Under the Administrative Procedure Act, this Court "will overturn [the] agency decision only if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 168 (2d Cir. 2013) (quoting *Cablevision Sys. Corp. v. FCC*, 570 F.3d 83, 91 (2d Cir. 2009)). This review is "highly deferential," *Connecticut Dep't of Pub. Util. Control v. FCC*, 78 F.3d 842, 849 (2d Cir. 1996) (quoting *Fulani v. FCC*, 49 F.3d 904, 908 (2d Cir. 1995)), and the Court may not "substitute [its] judgment for that of the agency," *N.Y. State Comm'n on Cable Television v. FCC*, 669 F.2d 58, 63 (2d Cir. 1982).

ARGUMENT

After failing to persuade the D.C. Circuit and the Supreme Court to save the Solicited Fax Rule, Petitioners now ask this Court to do so. But that relief is unavailable. The D.C. Circuit had exclusive authority to determine the validity of the Rule, and its *Bais Yaakov* decision forecloses any debate about the Rule's lawfulness. Indeed, this Court lacks jurisdiction to reconsider the validity of that Rule. Given *Bais Yaakov*, repeal was warranted because the Rule is substantively invalid, and the D.C. Circuit's mandate required the

repeal. Finally, because the Rule is invalid and now off the books, any dispute about the FCC's grant of retroactive waivers is moot.

I. THE D.C. CIRCUIT'S JUDGMENT THAT THE SOLICITED FAX RULE IS INVALID IS EXCLUSIVE AND BINDING.

Petitioners ask this Court "to determine whether the [Solicited Fax Rule] constitutes a valid exercise of the authority Congress gave the FCC in the TCPA." (Br. 36). To that end, Petitioners argue at length about inter-circuit *stare decisis* (Br. 21–24) and venue (Br. 24–36), urging this Court to chart its own path without regard to *Bais Yaakov*. Those arguments misunderstand the Hobbs Act's central features, which made the D.C. Circuit the "sole forum" for determining the Rule's validity. *King v. Time Warner Cable Inc.*, 894 F.3d 473, 476 n.3 (2d Cir. 2018). The Hobbs Act's plain text assigns to one "appropriate court of appeals" the "'exclusive jurisdiction . . . to determine the validity of'" the FCC's final orders promulgating substantive rules. *See PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2055 (2019) (quoting 28 U.S.C. § 2342(1)). Thus, this Court cannot independently "determine" that the Rule is "valid." (Br. 36).

A. The D.C. Circuit Had Exclusive Jurisdiction To Determine The Solicited Fax Rule's Validity.

The Hobbs Act is Congress's comprehensive scheme for pre-enforcement judicial review of the FCC's final orders. This review scheme

"promotes judicial efficiency" and leads to a "uniform, nationwide interpretation" of the TCPA. *See CE Design, Ltd. v. Prism Bus. Media, Inc.*, 606 F.3d 443, 450 (7th Cir. 2010) (quoting *United States v. Dunifer*, 219 F.3d 1004, 1008 (9th Cir. 2000)). The Hobbs Act achieves these goals through three interlocking requirements about jurisdiction, venue, and remedies:

- *First*, the Hobbs Act requires pre-enforcement petitions for review to be filed "within 60 days" of the FCC's entry of a final order. 28 U.S.C. § 2344.
- *Second*, if multiple timely petitions for review are filed in different courts of appeals, the petitions are consolidated in a single venue. *Id.* § 2112(a)(3).
- *Third*, the chosen venue then has "exclusive jurisdiction" over certain remedies, i.e., "to enjoin, set aside, suspend (in whole or in part), or to determine the validity" of the FCC's action. *Id.* § 2342(1).

In short, the Hobbs Act creates an efficient mechanism for a single court to resolve the validity of an FCC rule for all purposes. Thus, the Hobbs Act vests only "an *appropriate* court of appeals" with exclusive jurisdiction to determine the validity of the FCC's final orders. *PDR Network*, 139 S. Ct. at 2055 (emphasis added). The "appropriate" court of appeals is the one selected under the venue provision codified at 28 U.S.C. § 2112(a). Once the venue is chosen, the Hobbs Act's jurisdictional and remedial provisions create a nationwide binding effect for the resulting judicial determination. *See* 28

U.S.C. §§ 2342, 2344. As a result, "*only one* reviewing court could have jurisdiction over" the validity an FCC final order. *See In re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 638 n.17 (1978) (emphasis added) (citing 28 U.S.C. § 2342). Although Petitioners correctly say that the venue provision is relevant (Br. 24–36), they err by focusing on that one section to the exclusion of the remainder of the Hobbs Act's comprehensive judicial review scheme.

Here, the D.C. Circuit was the one "appropriate court of appeals" to determine the validity of the *2014 Order* and the Solicited Fax Rule. *PDR Network*, 139 S. Ct. at 2055. As the Commission recognized, the *2014 Order* involved "a serious, substantive reconsideration" of the Rule. *Repeal Order* ¶ 13 (SA059). When an agency "has considered substantively changing a rule but ultimately *declined* to do so," that is a new and reviewable agency action. *Mendoza v. Perez*, 754 F.3d 1002, 1019 n.12 (D.C. Cir. 2014) (emphasis in original). Thus, a rule's substantive validity is reviewable where an agency "has reconsidered and reinstated its original policy," *Pub. Citizen v. NRC*, 901 F.2d 147, 152 (D.C. Cir. 1990), such as by "request[ing] comments on the precise regulatory provision challenged in the petition for review," *Edison Elec. Inst. v. EPA*, 996 F.2d 326, 332 (D.C. Cir. 1993). Moreover, a rule's substantive validity is reviewable where a party petitions for rulemaking to repeal a rule on a "claim of unlawfulness," but the agency denies the petition

on substantive grounds. *Pub. Citizen*, 901 F.2d at 152; *see also* 5 U.S.C. § 553(e) (affording "the right to petition for the . . . repeal of a rule").

And that is what happened here. Parties petitioned the FCC for rulemaking to repeal the Solicited Fax Rule as beyond the FCC's power under the TCPA. *See 2014 Order*, 29 FCC Rcd at 14003 ¶ 12. The FCC then sought public comment on the Rule's validity and whether to "initiate a rulemaking to repeal section 64.1200(a)([4])(iv)." *See, e.g.*, 29 FCC Rcd at 1016–17. Ultimately, the Commission reaffirmed the Rule and denied the petition for rulemaking and other challenges on the substantive ground that the FCC had the authority to issue the Rule. *See 2014 Order*, 29 FCC Rcd at 14004–08 ¶¶ 14–21; *id*. at 14013 ¶¶ 34–35.

The FCC's reaffirmation of the Solicited Fax Rule was reviewable under the Hobbs Act. Because petitions for review challenging the reaffirmation were filed in multiple circuits, they were consolidated in the D.C. Circuit under 28 U.S.C. § 2112(a). (A775–76). Thus, that court was "the sole forum" with the power to address the *2014 Order* and, by extension, the "validity" of the underlying Rule. *King*, 894 F.3d at 476 n.3; *cf. Trans Alaska Pipeline*, 436 U.S. at 638 n.17 ("only one reviewing court could have jurisdiction" to determine validity under the Hobbs Act).

B. The D.C. Circuit's Invalidation Of The Solicited Fax Rule Applies Nationwide.

In *Bais Yaakov*, the D.C. Circuit exercised its "exclusive jurisdiction" to "determine the validity of" the FCC's reaffirmation of the Rule, 28 U.S.C. § 2342(1), and the court held "that the FCC's 2006 Solicited Fax Rule is unlawful"—i.e., invalid—"to the extent that it requires opt-out notices on solicited faxes," *Bais Yaakov*, 852 F.3d at 1083.

The D.C. Circuit understood that it was invalidating the underlying Rule, not just the *2014 Order* that reaffirmed the Rule. Accordingly, the court dismissed as moot challenges to the FCC's retroactive waivers of compliance with the Rule. *Id*. at 1083 n.2. If the D.C. Circuit had not invalidated the underlying 2006 Rule, but instead invalidated only the Rule's continued force after its 2014 reaffirmation, then the retroactive waivers would not have been moot. After all, the purpose of the waivers was to excuse conduct occurring *prior* to the FCC's 2014 reaffirmation of the Rule. Thus, only an invalidation of the Rule that applied prior to its reaffirmation could moot the waivers.

For this reason, the Commission on remand from the D.C. Circuit was correct in concluding that *Bais Yaakov* invalidated the 2006 Solicited Fax Rule itself, not just the *2014 Order*. *See Repeal Order* ¶¶ 11–12 (SA058–59). And the Commission also correctly concluded that *Bais Yaakov*'s invalidation of the Rule applies nationwide. *See id.* ¶¶ 11–12, 15 (SA058–60). The Hobbs

Act's plain text requires this result, as any contrary determination of validity would intrude on the "exclusive jurisdiction" that the D.C. Circuit exercised "to determine the validity" of the *2014 Order* as the one "appropriate court of appeals" under 28 U.S.C. § 2112(a). *PDR Network*, 139 S. Ct. at 2055 (citing and quoting 28 U.S.C. § 2342(1)). By vesting a single court with exclusive jurisdiction to determine the validity of an agency order, Congress necessarily decided that the court's decision will have nationwide effect, as no other court has authority to reconsider the issue of validity.

The Commission was not alone in reaching these conclusions. Prior to the *Repeal Order*, the Sixth Circuit concluded that "it was the Solicited Fax Rule itself that was struck down" in *Bais Yaakov*, a determination that the Sixth Circuit held was "binding outside of the D.C. Circuit." *Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460, 467–68 (6th Cir. 2017) (alteration omitted). The Ninth Circuit agreed that "the validity of the 2014 order depended on the validity of the 2006 Solicited Fax Rule," and that it was "bound by" *Bais Yaakov*'s holding "that the Solicited Fax Rule is invalid." *True Health Chiropractic, Inc. v. McKesson Corp.*, 896 F.3d 923, 930 (9th Cir. 2018).

Petitioners claim that *Sandusky* and *True Health*—and, by extension, the Commission—misread and overextend the venue provision codified at 28

U.S.C. § 2112(a). (Br. 26–32). These cases do no such thing. Rather, the Sixth and Ninth Circuits each recognize that Section 2112's venue provision is one piece of a bigger picture. As explained above, the "procedural mechanism" that makes Hobbs Act review rulings "binding outside of the D.C. Circuit" includes not only Section 2112's venue provision, but also Section 2342's grant of "exclusive jurisdiction . . . to determine the validity" of agency rules.[5] *Sandusky*, 863 F.3d at 467 (citing 28 U.S.C. §§ 2112, 2342–43) (alteration omitted); *see also True Health*, 896 F.3d at 930 (expressly agreeing).

That same plain language understanding of the Hobbs Act has already led this Court to agree with other circuits—including in decisions that Petitioners criticize (Br. 27–29)—that the Hobbs Act creates a "sole forum for addressing the validity of the FCC's order[s]." *King*, 894 F.3d at 476 n.3 (quoting *GTE S., Inc. v. Morrison*, 199 F.3d 733, 743 (4th Cir. 1999) (cleaned up)). As this Court has recognized, that conclusion follows from the Hobbs

[5] Contrary to Petitioners' contention, neither the *Repeal Order*, *Sandusky*, nor *True Health* state that *Bais Yaakov* creates "nationwide *stare decisis*." (Br. 26). The Hobbs Act's assignment of exclusive jurisdiction to "only one reviewing court," *Trans Alaska Pipeline*, 436 U.S. at 638 n.17, does not mean that all other courts are bound by the D.C. Circuit's textual analysis or rationale. What is binding, however, is the bottom-line judgment about the Rule's validity, because that judgment "enjoin[s]" the Commission, 28 U.S.C. § 2342(1), which is the only body Congress empowered to prescribe the Rule. *See* 47 U.S.C. § 227(b)(2).

Act's assignment of exclusive jurisdiction and not just the venue provision. *See id.* (citing 28 U.S.C. § 2342(1)). Thus, in *King*, the D.C. Circuit's exercise of Hobbs Act jurisdiction to invalidate another of the FCC's TCPA rules "removed any deference" that this Court owed to the invalidated rule. *Id.* at 477. *King*'s recognition of the binding effect of a Hobbs Act invalidation of an FCC rule disproves Petitioners' central argument that "where the initial circuit court decision resulted from an appeal from an agency order directly to a circuit court as authorized by the Hobbs Act, 28 U.S.C. § 2342(1), such a decision is not binding on other circuits." (Br. 23).

Petitioners strain to distinguish *King* on factual and procedural grounds. (Br. 29–32). But the key point from *King* is its recognition that the Hobbs Act assigns the power to determine the validity of an FCC rule in pre-enforcement proceedings to a single court of appeals. *King*, 894 F.3d at 476 n.3. *King* therefore forecloses Petitioners' central argument.

Petitioners' out-of-circuit cases also lend them no support. (Br. 23). In *Brizendine v. Cotter & Co.*, 4 F.3d 457, 462 n.4 (7th Cir. 1993), *vacated and remanded*, 511 U.S. 1103 (1994), the Seventh Circuit held that it was not bound by a decision declaring the application of a rule—not the rule itself—unlawful. *See Overland Exp., Inc. v. ICC*, 996 F.2d 356, 359–60 (D.C. Cir. 1993), *vacated and remanded*, 511 U.S. 1103 (1994). In *Brotherhood of Locomotive*

Engineers v. Boston & Maine Corp., 788 F.2d 794, 801–02 (1st Cir. 1986), the First Circuit held that an argument that relied on a prior Hobbs Act ruling was not properly presented. And in *Montship Lines, Ltd. v. Federal Maritime Board*, 295 F.2d 147, 150–51 (D.C. Cir. 1961), the D.C. Circuit simply held that it was the court with exclusive jurisdiction to decide petitions for review, rather than another court in which some petitions had been filed. Each of these cases is inapt to the situation here.

Petitioners also mistakenly argue that Justice Kavanaugh's concurring opinion in *PDR Network* requires a different result. (Br. 23–24). Although the concurrence allowed for the possibility that "an agency order is *upheld* in a facial, pre-enforcement challenge" but later challenged "as-applied" to a particular party in a different proceeding, 139 S. Ct. at 2066 (Kavanaugh, J., concurring) (emphasis added), it casts no doubt on the exclusive power of a single court of appeals to *invalidate* an agency rule nationwide under the Hobbs Act. Indeed, Justice Kavanaugh observed that "[i]f the court of appeals in a facial, pre-enforcement action determines that the order is invalid and enjoins it, the agency can no longer enforce the order." *Id.* at 2063 (Kavanaugh, J., concurring). And in any event, the concurrence does not "constitute[] binding precedent." *Maryland v. Wilson*, 519 U.S. 408, 413 (1997).

All told, the Hobbs Act's text, structure, and precedent each confirm what the Commission concluded: *Bais Yaakov* invalidated the Solicited Fax Rule nationwide. Where, as here, a rule has been held substantively unlawful on a pre-enforcement petition for review, the Hobbs Act precludes other courts of appeals from determining otherwise. This is not because of *stare decisis* (Br. 21–24) or venue alone (Br. 24–36), but instead because of the Hobbs Act's assignment of "exclusive jurisdiction" over particular remedies, including a determination of invalidity, to "only one reviewing court." *Trans Alaska Pipeline*, 436 U.S. at 638 n.17 (citing 28 U.S.C. § 2342). This Court therefore lacks power to provide Petitioners the relief they ultimately seek—a determination that the Rule is valid.[6]

II. THE COMMISSION DID NOT ERR BY REPEALING THE SOLICITED FAX RULE.

Petitioners present a single, narrowly focused challenge to the *Repeal Order*. They contend that the Solicited Fax Rule was a valid exercise of the

[6] Petitioners' discussion of the legislative history surrounding the Hobbs Act's venue provision, 28 U.S.C. § 2112(a), does nothing to undermine the Commission's argument. (Br. 32–36). For one, because the Hobbs Act's plain text (and this Court's precedent applying it) resolve the issue, resort to legislative history is unnecessary. *See Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 423 (2d Cir. 2005). In any event, and as discussed above, Petitioners err by focusing on Section 2112(a) without accounting for the "exclusive jurisdiction" provision codified at 28 U.S.C. § 2342(1).

Commission's power when promulgated (Br. 36–48), and—given that validity—the Commission had no power to repeal that valid rule *with retroactive effect* (Br. 48–49). Both of Petitioners' central premises are mistaken.

A. The Commission Correctly Repealed The Invalidated Rule.

The Commission repealed the Rule for a straightforward and entirely appropriate reason: "The D.C. Circuit held 'that the FCC's 2006 Solicited Fax Rule is unlawful to the extent that it requires opt-out notices on solicited faxes.'" *Repeal Order* ¶ 11 (quoting *Bais Yaakov*, 852 F.3d at 1083) (SA058). As explained in Part I, the Commission's conclusion was correct. The 2006 Rule's validity was properly before the D.C. Circuit in *Bais Yaakov* (*see* Part I-A, *supra*), and the D.C. Circuit's invalidation of the Rule is binding nationwide (*see* Part I-B, *supra*). Thus, the Commission properly determined that the Rule should be repealed, and that is a sufficient basis to deny the petition for review.

B. The D.C. Circuit's Mandate Required Repealing The Solicited Fax Rule.

The Commission alternatively concluded that it was "bound to comply with the D.C. Circuit's mandate" in *Bais Yaakov* by repealing the Solicited Fax Rule. *Repeal Order* ¶ 15 (SA059–60). Petitioners do not address this

independent basis for the *Repeal Order* and thus forfeit any challenge to it. *Cf. Zhang v. Gonzales*, 426 F.3d 540, 545 n.7 (2d Cir. 2005) (a petitioner "abandon[s]" challenges to agency conclusions if not sufficiently argued in the opening brief). In any event, the record supports the Commission's conclusion.

Under the well-settled mandate rule, the Commission must give "full effect" to the D.C. Circuit's judgment in *Bais Yaakov*. *See In re Coudert Bros. LLP*, 809 F.3d 94, 98 (2d Cir. 2015) (quotation marks omitted). "The mandate rule 'compels compliance on remand with the dictates of the superior court and forecloses relitigation of issues expressly or *impliedly* decided by the appellate court.'" *United States v. Ben Zvi*, 242 F.3d 89, 95 (2d Cir. 2001) (quoting *United States v. Bell*, 5 F.3d 64, 66 (4th Cir. 1993) (Second Circuit's emphasis)). This rule applies to agencies as well as to lower courts. *See, e.g.*, *NLRB v. Coca-Cola Bottling Co. of Buffalo, Inc.*, 55 F.3d 74, 77 (2d Cir. 1995) (agency had "no jurisdiction to modify a decree of this court"); *Atl. City Elec. Co. v. FERC*, 329 F.3d 856, 858 (D.C. Cir. 2003) (noting the court's "power to enforce its mandates," including as to agencies); *see also* 18B Wright & Miller, *Federal Practice and Procedure* § 4478.3 (2d ed. April 2020 Update) (collecting cases).

Because "a mandate may extend beyond express holdings," an agency "should look to both the specific dictates of the remand order as well as the

broader spirit of the mandate." *Ben Zvi*, 242 F.3d at 95, 99; *accord U.S. Postal Serv. v. Postal Regul. Comm'n*, 747 F.3d 906, 910 (D.C. Cir. 2014) (agency "is without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion"). And if a mandate requires an agency "to conduct specific proceedings," the agency "must conduct those proceedings." *Puricelli v. Argentina*, 797 F.3d 213, 218 (2d Cir. 2015).

As the Commission recognized, the spirit of the D.C. Circuit's mandate in *Bais Yaakov* required a proceeding to repeal the Rule. *Repeal Order* ¶¶ 14–15 (SA059–60). In the earlier FCC proceeding challenging the Rule, Staples, Inc. asked the Commission to "initiate a rulemaking to repeal" the Solicited Fax Rule because it "plainly exceeds the agency's statutory authority." 29 FCC Rcd at 1016. The Commission then reaffirmed (rather than repeal) the Rule. *2014 Order*, 29 FCC Rcd at 14003 ¶ 12; *id.* at 14013 ¶ 35. That refusal to repeal the Rule was squarely before the D.C. Circuit,[7] which rejected the FCC's

[7] *See* Petition for Review, *Staples, Inc. v. FCC*, No. 14-1302, at 6 (D.C. Cir. Dec. 29, 2014) (arguing that the FCC "acted arbitrarily and capriciously, and otherwise not in accordance with law, in refusing to initiate a rulemaking proceeding to repeal the Solicited Fax Rule"); *accord* Joint Brief for Class Action Defendant Petitioners and Intervenors, *Bais Yaakov of Spring Valley v. FCC*, No. 14-1234, 2015 WL 6941696, at *1 (D.C. Cir. Nov. 9, 2015) (presenting "[w]hether the FCC's denial of Petitioners' requests to initiate a rulemaking to repeal the Solicited Fax Rule was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

rationale for not repealing the Rule and "remand[ed] for further proceedings." *Bais Yaakov*, 852 F.3d at 1083; *see also* Judgment, *Bais Yaakov v. FCC*, No. 14-1234 (D.C. Cir. Mar. 31, 2017) (vacating and remanding in No. 14-1302, which petitioned for review of the FCC's refusal to repeal the Solicited Fax Rule).

Because one of the prevailing parties in *Bais Yaakov* challenged the FCC's refusal "to conduct specific proceedings" to repeal the Solicited Fax Rule, the D.C. Circuit's mandate "necessarily implied" that the FCC had an obligation to conduct those proceedings on remand. *Cf. In re Coudert Bros. LLP*, 809 F.3d at 99 (quotation marks omitted). And because *Bais Yaakov* held the Rule invalid, the mandate also "foreclose[d] relitigation" of the Rule's validity. *Cf. Ben Zvi*, 242 F.3d at 95. Thus, the FCC correctly concluded that *Bais Yaakov* required repealing the Rule.[8] *Repeal Order* ¶ 11 (SA058).

[8] Petitioners make a passing reference to the absence of notice and comment when repealing the Rule (Br. 14), but they have not challenged the *Repeal Order* on that basis. Thus, they forfeit the issue. *See Littlejohn v. City of New York*, 795 F.3d 297, 313 n.12 (2d Cir. 2015) ("Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal." (quotation marks omitted)); *McCarthy v. SEC*, 406 F.3d 179, 186 (2d Cir. 2005) ("[A]rguments not raised in an appellant's opening brief, but only in his reply brief, are not properly before an appellate court[.]"). Moreover, the *Bais Yaakov* ruling required the repeal, thus making notice and comment unnecessary. *See* 5 U.S.C. § 553(b)(B) (providing that "good cause" can excuse notice and comment that is "impracticable, unnecessary, or contrary to the public interest").

C. The Commission's Decision To Repeal The Solicited Fax Rule Was Also A Reasonable Policy Choice.

Even if the Solicited Fax Rule were not invalid nationwide and the FCC were not bound to repeal the Rule, the Commission reasonably did so as a matter of policy because of the Rule's widespread invalidation.

During rulemaking, agencies may consider judicial rulings that have "held [rules] unlawful as applied" as well as "concerns raised in . . . court filings." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2384 (2020) (cleaned up). By the time of the repeal, three federal appeals courts—the D.C., Sixth, and Ninth Circuits—had held that the Rule invalid. *See Repeal Order* ¶ 12 (citing *Bais Yaakov*, *Sandusky*, 863 F.3d at 467–68, and *True Health*, 896 F.3d at 930) (SA058–59).[9]

In these circumstances, the Commission's adherence to *Bais Yaakov* and repeal of the Rule were reasonable. The D.C. Circuit is always an appropriate venue to challenge any future final orders regarding the Rule. *See* 28 U.S.C. § 2343 (stating that "venue of a proceeding under [the Hobbs Act]" may be "in

[9] One of these courts also expressly "agree[d] with the majority in *Bais Yaakov* that, per the clear text of the TCPA, the FCC does not have the authority to regulate solicited faxes." *Sandusky*, 863 F.3d at 467 n.1. Shortly after the *Repeal Order* issued, the Third Circuit likewise "agree[d] with *Bais Yaakov* . . . that the FCC cannot require solicited fax advertisements to include opt-out notices." *Physicians Healthsource, Inc. v. Cephalon, Inc.*, 954 F.3d 615, 623 (3d Cir. 2020).

the United States Court of Appeals for the District of Columbia Circuit"). Under *Bais Yaakov*, the Commission would be hard pressed to defend continued adherence to the Rule in the D.C. Circuit.[10]

The decisions in the Sixth and Ninth Circuits rendered defense of the Rule even more difficult. When "three circuits have rejected the [agency's] position, and not one has accepted it," an agency's "further resistance" makes it susceptible to claims of "contempt for the rule of law." *Johnson v. U.S. R.R. Ret. Bd.*, 969 F.2d 1082, 1093 (D.C. Cir. 1992). Adherence to the validity of a substantive rule governing private conduct, despite that rule's invalidation in three federal courts of appeals, would also undermine considerations of "fairness and national uniformity." *Cf. id.*; *see also CE Design, Ltd.*. 606 F.3d at 450 (noting the goal of a "uniform, nationwide interpretation" of the TCPA). Thus, the *Repeal Order* was a reasonable response to these judicial holdings.

[10] Petitioners' argument that the FCC can "pursue agency action in conflict with the D.C. Circuit" (Br. 22) is based on inapt authority about the Social Security Administration and other agencies that are not subject to the Hobbs Act. The Hobbs Act's jurisdictional, venue, and remedial provisions distinguish the FCC from agencies that can litigate the validity of their rules in multiple cases across different circuits. *See* 28 U.S.C. §§ 2342–44. In any event, Petitioners cite no case holding that an agency's acquiescence to a judicial ruling in a Hobbs Act case was arbitrary, capricious, or contrary to law.

D. The Repeal Was Not Impermissibly Retroactive.

Petitioners' remaining argument that the repeal was impermissibly retroactive fares no better than their other claims. (Br. 48–49).

First, Petitioners' retroactivity argument by its own terms depends on the Solicited Fax Rule's validity. (Br. 48). Because the Rule was declared invalid on Hobbs Act review, it cannot be a source of liability for any period—even the period prior to its formal repeal. A regulation that "'operates to create a rule out of harmony' with the statute under which it is promulgated . . . is considered a 'nullity.'" *60 Key Centre Inc. v. Adm'r of Gen. Servs. Admin.*, 47 F.3d 55, 58 (2d Cir. 1995) (quoting *Manhattan Gen. Equip. Co. v. Comm'r*, 297 U.S. 129, 134 (1936)). Because the D.C. Circuit held that the Rule is inconsistent with the TCPA, the Rule has never been valid. *See Bais Yaakov*, 852 F.3d at 1083. Retroactivity is not an issue in such circumstances, as Petitioners' own argument concedes.

Second, Petitioners' retroactivity argument misunderstands the *Repeal Order*. Petitioners infer an intent to repeal with retroactive effect from the Commission's statement in a footnote that the Solicited Fax Rule "was never legally valid or enforceable." *Repeal Order* ¶ 16 n.42 (cited at Br. 48–49) (SA060). But that was a summary of the D.C. Circuit's holding, not a statement of the Commission's intent. The Commission did not engage in

retroactive rulemaking; it faithfully implemented the D.C. Circuit's judgment.[11]

III. THE COMMISSION PROPERLY DISMISSED THE APPLICATIONS FOR REVIEW OF THE RETROACTIVE WAIVERS AS MOOT.

Petitioners also object to certain waivers excusing various parties from compliance with the Rule prior to April 30, 2015. (Br. 49–58). That issue is moot.

Under Article III of the Constitution, federal courts may resolve only "live cases and controversies." *County of Suffolk v. Sebelius*, 605 F.3d 135, 140 (2d Cir. 2010) (quoting *United States v. Quattrone*, 402 F.3d 304, 308 (2d Cir. 2005)). A dispute is moot, and therefore beyond the federal judicial power, if it is "impossible for the court to grant any effectual relief whatever to a prevailing party." *Id*. (quotation marks omitted). A ruling that is "merely advisory" with no practical effect on the parties is not a proper "exercise of

[11] Petitioners' cited cases are therefore inapt. (Br. 48). *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988), and *Reiseck v. Universal Communications of Miami, Inc.*, 591 F.3d 101, 105 n.5 (2d Cir. 2010), apply when a regulation "would impose new duties with respect to transactions already completed," which is not the repeal's purpose or effect. *Sweet v. Sheahan*, 235 F.3d 80, 89 (2d Cir. 2000) (quotation marks omitted). Nor is this a case in which an agency deviated from its legislative rules during an adjudication. *See Ariz. Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, 389 (1932).

federal jurisdiction." *United States v. Leon*, 203 F.3d 162, 164 (2d Cir. 2000) (per curiam).

The relief Petitioners seek—reversal of the waivers (Br. 58)—would have no effect. As the Commission explained, *Bais Yaakov* held that "the Commission did not have the authority to adopt the Solicited Fax Rule in the first instance," which rendered the rule "'a mere nullity.'" *Repeal Order* ¶ 16 n.42 (quoting *Dixon v. United States*, 381 U.S. 68, 74 (1965)) (SA060). There was no lawful obligation for the Commission to waive, and Petitioners have nothing to gain from judicial reversal of waivers from compliance with an invalidated rule. Just as the D.C. Circuit did in *Bais Yaakov*, the Commission properly dismissed as moot the requests for review or reconsideration of the waivers.[12] *Repeal Order* ¶¶ 16, 18 (SA060–61); *see Bais Yaakov*, 852 F.3d at 1083 n.2; *accord True Health*, 896 F.3d at 930 n.2 (holding that there is no

[12] Even if the Court were to conclude that this was an error, the "proper course" is "to remand to the agency for additional investigation or explanation." *Gonzales v. Thomas*, 547 U.S. 183, 186 (2006) (per curiam) (quotation marks omitted). Petitioners' argument for reversal rather than remand (Br. 58) rests on inapt harmless error cases about when a court may "affirm[]" an agency "despite legal error" when a remand to correct the error would produce the same result. *Cao He Lin v. U.S. Dep't of Just.*, 428 F.3d 391, 402 (2d Cir. 2005) (citing *NLRB v. Am. Geri-Care, Inc.*, 697 F.2d 56, 64 (2d Cir. 1982)). Petitioners cite no case allowing outright reversal on a ground the Commission did not consider.

need to address arguments about the FCC's waivers in light of the Solicited Fax Rule's invalidation).

CONCLUSION

The Court should deny the petition for review.

Respectfully submitted,

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October 20, 2020

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that the accompanying brief complies with the type-volume limitation of Second Circuit Local Rule 32.1(a)(4) because it contains 7,891 words, not including those portions of the brief excluded under Fed. R. App. P. 32(f). The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 360 in 14-point Times New Roman.

Dated: October 20, 2020

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on October 20, 2020, I caused the foregoing Brief of Respondents Federal Communications Commission and United States of America in Opposition to be filed with the Clerk of the Court for the U.S. Court of Appeals for the Second Circuit using the Court's CM/ECF system, which caused a true and correct copy of the same to be served on all attorneys registered to receive such notices.

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Statutory Addendum

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28 U.S.C. § 2112

§ 2112. Record on review and enforcement of agency orders

(a) The rules prescribed under the authority of section 2072 of this title may provide for the time and manner of filing and the contents of the record in all proceedings instituted in the courts of appeals to enjoin, set aside, suspend, modify, or otherwise review or enforce orders of administrative agencies, boards, commissions, and officers. Such rules may authorize the agency, board, commission, or officer to file in the court a certified list of the materials comprising the record and retain and hold for the court all such materials and transmit the same or any part thereof to the court, when and as required by it, at any time prior to the final determination of the proceeding, and such filing of such certified list of the materials comprising the record and such subsequent transmittal of any such materials when and as required shall be deemed full compliance with any provision of law requiring the filing of the record in the court. The record in such proceedings shall be certified and filed in or held for and transmitted to the court of appeals by the agency, board, commission, or officer concerned within the time and in the manner prescribed by such rules. If proceedings are instituted in two or more courts of appeals with respect to the same order, the following shall apply:

> **(1)** If within ten days after issuance of the order the agency, board, commission, or officer concerned receives, from the persons instituting the proceedings, the petition for review with respect to proceedings in at least two courts of appeals, the agency, board, commission, or officer shall proceed in accordance with paragraph (3) of this subsection. If within ten days after the issuance of the order the agency, board, commission, or officer concerned receives, from the persons instituting the proceedings, the petition for review with respect to proceedings in only one court of appeals, the agency, board, commission, or officer shall file the record in that court notwithstanding the institution in any other court of appeals of proceedings for review of that order. In all other cases in which proceedings have been instituted in two or more courts of appeals with respect to the same order, the agency, board, commission, or officer concerned shall file the record in the court in which proceedings with respect to the order were first instituted.
>
> **(2)** For purposes of paragraph (1) of this subsection, a copy of the petition or other pleading which institutes proceedings in a court of appeals and which is stamped by the court with the date of filing shall constitute the petition for review. Each agency, board, commission, or officer, as the case may be, shall designate by rule the office and the officer who must receive petitions for review under paragraph (1).
>
> **(3)** If an agency, board, commission, or officer receives two or more petitions for review of an order in accordance with the first sentence of paragraph (1) of this subsection, the agency, board, commission, or officer shall, promptly after the expiration of the ten-day period specified in that sentence, so notify the judicial panel on multidistrict litigation authorized by section 1407 of this title, in such form as that panel shall prescribe. The judicial panel on multidistrict litigation shall, by means of random selection, designate one court of appeals, from among the courts of appeals in which petitions for review have been filed and received within the ten-day period specified in the first sentence of

paragraph (1), in which the record is to be filed, and shall issue an order consolidating the petitions for review in that court of appeals. The judicial panel on multidistrict litigation shall, after providing notice to the public and an opportunity for the submission of comments, prescribe rules with respect to the consolidation of proceedings under this paragraph. The agency, board, commission, or officer concerned shall file the record in the court of appeals designated pursuant to this paragraph.

(4) Any court of appeals in which proceedings with respect to an order of an agency, board, commission, or officer have been instituted may, to the extent authorized by law, stay the effective date of the order. Any such stay may thereafter be modified, revoked, or extended by a court of appeals designated pursuant to paragraph (3) with respect to that order or by any other court of appeals to which the proceedings are transferred.

(5) All courts in which proceedings are instituted with respect to the same order, other than the court in which the record is filed pursuant to this subsection, shall transfer those proceedings to the court in which the record is so filed. For the convenience of the parties in the interest of justice, the court in which the record is filed may thereafter transfer all the proceedings with respect to that order to any other court of appeals.

(b) The record to be filed in the court of appeals in such a proceeding shall consist of the order sought to be reviewed or enforced, the findings or report upon which it is based, and the pleadings, evidence, and proceedings before the agency, board, commission, or officer concerned, or such portions thereof (1) as the rules prescribed under the authority of section 2072 of this title may require to be included therein, or (2) as the agency, board, commission, or officer concerned, the petitioner for review or respondent in enforcement, as the case may be, and any intervenor in the court proceeding by written stipulation filed with the agency, board, commission, or officer concerned or in the court in any such proceeding may consistently with the rules prescribed under the authority of section 2072 of this title designate to be included therein, or (3) as the court upon motion of a party or, after a prehearing conference, upon its own motion may by order in any such proceeding designate to be included therein. Such a stipulation or order may provide in an appropriate case that no record need be filed in the court of appeals. If, however, the correctness of a finding of fact by the agency, board, commission, or officer is in question all of the evidence before the agency, board, commission, or officer shall be included in the record except such as the agency, board, commission, or officer concerned, the petitioner for review or respondent in enforcement, as the case may be, and any intervenor in the court proceeding by written stipulation filed with the agency, board, commission, or officer concerned or in the court agree to omit as wholly immaterial to the questioned finding. If there is omitted from the record any portion of the proceedings before the agency, board, commission, or officer which the court subsequently determines to be proper for it to consider to enable it to review or enforce the order in question the court may direct that such additional portion of the proceedings be filed as a supplement to the record. The agency, board, commission, or officer concerned may, at its option and without regard to the foregoing provisions of this subsection, and if so requested by the petitioner for review or respondent in enforcement shall, file in the court the entire record of the proceedings before it without abbreviation.

(c) The agency, board, commission, or officer concerned may transmit to the court of appeals the original papers comprising the whole or any part of the record or any supplemental record, otherwise true copies of such papers certified by an authorized officer or deputy of the agency, board, commission, or officer concerned shall be transmitted. Any original papers thus transmitted to the court of appeals shall be returned to the agency, board, commission, or officer concerned upon the final determination of the review or enforcement proceeding. Pending such final determination any such papers may be returned by the court temporarily to the custody of the agency, board, commission, or officer concerned if needed for the transaction of the public business. Certified copies of any papers included in the record or any supplemental record may also be returned to the agency, board, commission, or officer concerned upon the final determination of review or enforcement proceedings.

(d) The provisions of this section are not applicable to proceedings to review decisions of the Tax Court of the United States or to proceedings to review or enforce those orders of administrative agencies, boards, commissions, or officers which are by law reviewable or enforceable by the district courts.

28 U.S.C. § 2342

§ 2342. Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of--

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) all rules, regulations, or final orders of--

(A) the Secretary of Transportation issued pursuant to section 50501, 50502, 56101-56104, or 57109 of title 46 or pursuant to part B or C of subtitle IV, subchapter III of chapter 311, chapter 313, or chapter 315 of title 49; and

(B) the Federal Maritime Commission issued pursuant to section 305, 41304, 41308, or 41309 or chapter 421 or 441 of title 46;

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;

(5) all rules, regulations, or final orders of the Surface Transportation Board made reviewable by section 2321 of this title;

(6) all final orders under section 812 of the Fair Housing Act; and

(7) all final agency actions described in section 20114(c) of title 49.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

28 U.S.C. § 2343

§ 2343. Venue

The venue of a proceeding under this chapter is in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit.

28 U.S.C. § 2344

§ 2344. Review of orders; time; notice; contents of petition; service

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of--

(1) the nature of the proceedings as to which review is sought;

(2) the facts on which venue is based;

(3) the grounds on which relief is sought; and

(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

47 U.S.C. § 227

§ 227. Restrictions on use of telephone equipment

(a) Definitions
As used in this section--

(1) The term “automatic telephone dialing system” means equipment which has the capacity--

(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and

(B) to dial such numbers.

(2) The term "established business relationship", for purposes only of subsection (b)(1)(C)(i), shall have the meaning given the term in section 64.1200 of title 47, Code of Federal Regulations, as in effect on January 1, 2003, except that--

(A) such term shall include a relationship between a person or entity and a business subscriber subject to the same terms applicable under such section to a relationship between a person or entity and a residential subscriber; and

(B) an established business relationship shall be subject to any time limitation established pursuant to paragraph (2)(G)).

(3) The term "telephone facsimile machine" means equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(4) The term "telephone solicitation" means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.

(5) The term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States--

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice--

(i) to any emergency telephone line (including any "911" line and any emergency line of a hospital, medical physician or service office, health

care facility, poison control center, or fire protection or law enforcement agency);
(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call, unless such call is made solely to collect a debt owed to or guaranteed by the United States;

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes, is made solely pursuant to the collection of a debt owed to or guaranteed by the United States, or is exempted by rule or order by the Commission under paragraph (2)(B);

(C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless--

(i) the unsolicited advertisement is from a sender with an established business relationship with the recipient;

(ii) the sender obtained the number of the telephone facsimile machine through--

(I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or

(II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution,

except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005, if the sender possessed the facsimile machine number of the recipient before July 9, 2005; and

(iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D),

except that the exception under clauses (i) and (ii) shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile

machine by a sender to whom a request has been made not to send future unsolicited advertisements to such telephone facsimile machine that complies with the requirements under paragraph (2)(E); or

(D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(2) Regulations; exemptions and other provisions
The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission--

(A) shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent;

(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe--

(i) calls that are not made for a commercial purpose; and

(ii) such classes or categories of calls made for commercial purposes as the Commission determines--

(I) will not adversely affect the privacy rights that this section is intended to protect; and

(II) do not include the transmission of any unsolicited advertisement;

(C) may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect;

(D) shall provide that a notice contained in an unsolicited advertisement complies with the requirements under this subparagraph only if--

(i) the notice is clear and conspicuous and on the first page of the unsolicited advertisement;

(ii) the notice states that the recipient may make a request to the sender of the unsolicited advertisement not to send any future unsolicited advertisements to a telephone facsimile machine or machines and that failure to comply, within the shortest reasonable time, as determined by

the Commission, with such a request meeting the requirements under subparagraph (E) is unlawful;
(iii) the notice sets forth the requirements for a request under subparagraph (E);

(iv) the notice includes--

(I) a domestic contact telephone and facsimile machine number for the recipient to transmit such a request to the sender; and

(II) a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the unsolicited advertisement; the Commission shall by rule require the sender to provide such a mechanism and may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, exempt certain classes of small business senders, but only if the Commission determines that the costs to such class are unduly burdensome given the revenues generated by such small businesses;

(v) the telephone and facsimile machine numbers and the cost-free mechanism set forth pursuant to clause (iv) permit an individual or business to make such a request at any time on any day of the week; and

(vi) the notice complies with the requirements of subsection (d);

(E) shall provide, by rule, that a request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if--

(i) the request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;

(ii) the request is made to the telephone or facsimile number of the sender of such an unsolicited advertisement provided pursuant to subparagraph (D)(iv) or by any other method of communication as determined by the Commission; and

(iii) the person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine;

(F) may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the association's tax-exempt purpose that do not

contain the notice required by paragraph (1)(C)(iii), except that the Commission may take action under this subparagraph only--

(i) by regulation issued after public notice and opportunity for public comment; and

(ii) if the Commission determines that such notice required by paragraph (1)(C)(iii) is not necessary to protect the ability of the members of such associations to stop such associations from sending any future unsolicited advertisements;

(G)(i) may, consistent with clause (ii), limit the duration of the existence of an established business relationship, however, before establishing any such limits, the Commission shall--

(I) determine whether the existence of the exception under paragraph (1)(C) relating to an established business relationship has resulted in a significant number of complaints to the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines;

(II) determine whether a significant number of any such complaints involve unsolicited advertisements that were sent on the basis of an established business relationship that was longer in duration than the Commission believes is consistent with the reasonable expectations of consumers;

(III) evaluate the costs to senders of demonstrating the existence of an established business relationship within a specified period of time and the benefits to recipients of establishing a limitation on such established business relationship; and

(IV) determine whether with respect to small businesses, the costs would not be unduly burdensome; and

(ii) may not commence a proceeding to determine whether to limit the duration of the existence of an established business relationship before the expiration of the 3-month period that begins on July 9, 2005;

(H) may restrict or limit the number and duration of calls made to a telephone number assigned to a cellular telephone service to collect a debt owed to or guaranteed by the United States; and

(I) shall ensure that any exemption under subparagraph (B) or (C) contains requirements for calls made in reliance on the exemption with respect to--

(i) the classes of parties that may make such calls;

(ii) the classes of parties that may be called; and

(iii) the number of such calls that a calling party may make to a particular called party.

(3) Private right of action
A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State--

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(4) Civil forfeiture

(A) In general

Any person that is determined by the Commission, in accordance with paragraph (3) or (4) of section 503(b) of this title, to have violated this subsection shall be liable to the United States for a forfeiture penalty pursuant to section 503(b)(1) of this title. Paragraph (5) of section 503(b) of this title shall not apply in the case of a violation of this subsection. A forfeiture penalty under this subparagraph shall be in addition to any other penalty provided for by this chapter. The amount of the forfeiture penalty determined under this subparagraph shall be determined in accordance with subparagraphs (A) through (F) of section 503(b)(2) of this title.

(B) Violation with intent

Any person that is determined by the Commission, in accordance with paragraph (3) or (4) of section 503(b) of this title, to have violated this subsection with the intent to cause such violation shall be liable to the United States for a forfeiture penalty pursuant to section 503(b)(1) of this title. Paragraph (5) of section 503(b) of this title shall not apply in the case of a violation of this subsection. A forfeiture penalty under this subparagraph shall be in addition to any other penalty provided for by this chapter. The amount of the forfeiture penalty determined under this subparagraph shall be equal to an amount determined in accordance

with subparagraphs (A) through (F) of section 503(b)(2) of this title plus an additional penalty not to exceed $10,000.

(C) Recovery

Any forfeiture penalty determined under subparagraph (A) or (B) shall be recoverable under section 504(a) of this title.

(D) Procedure

No forfeiture liability shall be determined under subparagraph (A) or (B) against any person unless such person receives the notice required by section 503(b)(3) of this title or section 503(b)(4) of this title.

(E) Statute of limitations

Notwithstanding paragraph (6) of section 503(b) of this title, no forfeiture penalty shall be determined or imposed against any person--

(i) under subparagraph (A) if the violation charged occurred more than 1 year prior to the date of issuance of the required notice or notice of apparent liability; or

(ii) under subparagraph (B) if the violation charged occurred more than 4 years prior to the date of issuance of the required notice or notice of apparent liability.

(F) Rule of construction

Notwithstanding any law to the contrary, the Commission may not determine or impose a forfeiture penalty on a person under both subparagraphs (A) and (B) based on the same conduct.

(c) Protection of subscriber privacy rights

(1) Rulemaking proceeding required
Within 120 days after December 20, 1991, the Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object. The proceeding shall--

(A) compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or company-specific “do not call” systems, and any other alternatives, individually or in combination) for their effectiveness in

protecting such privacy rights, and in terms of their cost and other advantages and disadvantages;

(B) evaluate the categories of public and private entities that would have the capacity to establish and administer such methods and procedures;

(C) consider whether different methods and procedures may apply for local telephone solicitations, such as local telephone solicitations of small businesses or holders of second class mail permits;

(D) consider whether there is a need for additional Commission authority to further restrict telephone solicitations, including those calls exempted under subsection (a)(3) of this section, and, if such a finding is made and supported by the record, propose specific restrictions to the Congress; and

(E) develop proposed regulations to implement the methods and procedures that the Commission determines are most effective and efficient to accomplish the purposes of this section.

(2) Regulations

Not later than 9 months after December 20, 1991, the Commission shall conclude the rulemaking proceeding initiated under paragraph (1) and shall prescribe regulations to implement methods and procedures for protecting the privacy rights described in such paragraph in an efficient, effective, and economic manner and without the imposition of any additional charge to telephone subscribers.

(3) Use of database permitted

The regulations required by paragraph (2) may require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase. If the Commission determines to require such a database, such regulations shall--

(A) specify a method by which the Commission will select an entity to administer such database;

(B) require each common carrier providing telephone exchange service, in accordance with regulations prescribed by the Commission, to inform subscribers for telephone exchange service of the opportunity to provide notification, in accordance with regulations established under this paragraph, that such subscriber objects to receiving telephone solicitations;

(C) specify the methods by which each telephone subscriber shall be informed, by the common carrier that provides local exchange service to that subscriber, of (i)

the subscriber's right to give or revoke a notification of an objection under subparagraph (A), and (ii) the methods by which such right may be exercised by the subscriber;
(D) specify the methods by which such objections shall be collected and added to the database;

(E) prohibit any residential subscriber from being charged for giving or revoking such notification or for being included in a database compiled under this section;

(F) prohibit any person from making or transmitting a telephone solicitation to the telephone number of any subscriber included in such database;

(G) specify (i) the methods by which any person desiring to make or transmit telephone solicitations will obtain access to the database, by area code or local exchange prefix, as required to avoid calling the telephone numbers of subscribers included in such database; and (ii) the costs to be recovered from such persons;

(H) specify the methods for recovering, from persons accessing such database, the costs involved in identifying, collecting, updating, disseminating, and selling, and other activities relating to, the operations of the database that are incurred by the entities carrying out those activities;

(I) specify the frequency with which such database will be updated and specify the method by which such updating will take effect for purposes of compliance with the regulations prescribed under this subsection;

(J) be designed to enable States to use the database mechanism selected by the Commission for purposes of administering or enforcing State law;

(K) prohibit the use of such database for any purpose other than compliance with the requirements of this section and any such State law and specify methods for protection of the privacy rights of persons whose numbers are included in such database; and

(L) require each common carrier providing services to any person for the purpose of making telephone solicitations to notify such person of the requirements of this section and the regulations thereunder.

(4) Considerations required for use of database method

If the Commission determines to require the database mechanism described in paragraph (3), the Commission shall--

(A) in developing procedures for gaining access to the database, consider the different needs of telemarketers conducting business on a national, regional, State, or local level;

(B) develop a fee schedule or price structure for recouping the cost of such database that recognizes such differences and--

(i) reflect the relative costs of providing a national, regional, State, or local list of phone numbers of subscribers who object to receiving telephone solicitations;

(ii) reflect the relative costs of providing such lists on paper or electronic media; and

(iii) not place an unreasonable financial burden on small businesses; and

(C) consider (i) whether the needs of telemarketers operating on a local basis could be met through special markings of area white pages directories, and (ii) if such directories are needed as an adjunct to database lists prepared by area code and local exchange prefix.

(5) Private right of action

A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may, if otherwise permitted by the laws or rules of court of a State bring in an appropriate court of that State--

(A) an action based on a violation of the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive up to $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

It shall be an affirmative defense in any action brought under this paragraph that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under this subsection. If the court finds that the defendant willfully or knowingly violated the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(6) Relation to subsection (b)

The provisions of this subsection shall not be construed to permit a communication prohibited by subsection (b).

(d) Technical and procedural standards

(1) Prohibition

It shall be unlawful for any person within the United States--

(A) to initiate any communication using a telephone facsimile machine, or to make any telephone call using any automatic telephone dialing system, that does not comply with the technical and procedural standards prescribed under this subsection, or to use any telephone facsimile machine or automatic telephone dialing system in a manner that does not comply with such standards; or

(B) to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.

(2) Telephone facsimile machines

The Commission shall revise the regulations setting technical and procedural standards for telephone facsimile machines to require that any such machine which is manufactured after one year after December 20, 1991, clearly marks, in a margin at the top or bottom of each transmitted page or on the first page of each transmission, the date and time sent, an identification of the business, other entity, or individual sending the message, and the telephone number of the sending machine or of such business, other entity, or individual.

(3) Artificial or prerecorded voice systems

The Commission shall prescribe technical and procedural standards for systems that are used to transmit any artificial or prerecorded voice message via telephone. Such standards shall require that--

(A) all artificial or prerecorded telephone messages (i) shall, at the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and (ii) shall, during or after the message, state clearly the telephone number or address of such business, other entity, or individual; and

(B) any such system will automatically release the called party's line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls.

(e) Prohibition on provision of misleading or inaccurate caller identification information

(1) In general

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States, in connection with any voice service or text messaging service, to cause any caller identification service to knowingly transmit misleading or inaccurate caller identification information with the intent to defraud, cause harm, or wrongfully obtain anything of value, unless such transmission is exempted pursuant to paragraph (3)(B).

(2) Protection for blocking caller identification information

Nothing in this subsection may be construed to prevent or restrict any person from blocking the capability of any caller identification service to transmit caller identification information.

(3) Regulations

(A) In general

The Commission shall prescribe regulations to implement this subsection.

(B) Content of regulations

(i) In general

The regulations required under subparagraph (A) shall include such exemptions from the prohibition under paragraph (1) as the Commission determines is appropriate.

(ii) Specific exemption for law enforcement agencies or court orders

The regulations required under subparagraph (A) shall exempt from the prohibition under paragraph (1) transmissions in connection with--

(I) any authorized activity of a law enforcement agency; or

(II) a court order that specifically authorizes the use of caller identification manipulation.

(4) Repealed. Pub.L. 115-141, Div. P, Title IV, § 402(i)(3), Mar. 23, 2018, 132 Stat. 1089

(5) Penalties

(A) Civil forfeiture

(i) In general

Any person that is determined by the Commission, in accordance with paragraphs (3) and (4) of section 503(b) of this title, to have violated this subsection shall be liable to the United States for a forfeiture penalty. A forfeiture penalty under this paragraph shall be in addition to any other penalty provided for by this chapter. The amount of the forfeiture penalty determined under this paragraph shall not exceed $10,000 for each violation, or 3 times that amount for each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $1,000,000 for any single act or failure to act.

(ii) Recovery

Any forfeiture penalty determined under clause (i) shall be recoverable pursuant to section 504(a) of this title. Paragraph (5) of section 503(b) of this title shall not apply in the case of a violation of this subsection.

(iii) Procedure

No forfeiture liability shall be determined under clause (i) against any person unless such person receives the notice required by section 503(b)(3) of this title or section 503(b)(4) of this title.

(iv) 4-year statute of limitations

No forfeiture penalty shall be determined or imposed against any person under clause (i) if the violation charged occurred more than 4 years prior to the date of issuance of the required notice or notice or apparent liability.

(B) Criminal fine

Any person who willfully and knowingly violates this subsection shall upon conviction thereof be fined not more than $10,000 for each violation, or 3 times that amount for each day of a continuing violation, in lieu of the fine provided by section 501 of this title for such a violation. This subparagraph does not supersede the provisions of section 501 of this title relating to imprisonment or the imposition of a penalty of both fine and imprisonment.

(6) Enforcement by States

(A) In general

The chief legal officer of a State, or any other State officer authorized by law to bring actions on behalf of the residents of a State, may bring a civil action, as parens patriae, on behalf of the residents of that State in an appropriate district court of the United States to enforce this subsection or to impose the civil penalties for violation of this subsection, whenever the chief legal officer or other

State officer has reason to believe that the interests of the residents of the State have been or are being threatened or adversely affected by a violation of this subsection or a regulation under this subsection.

(B) Notice

The chief legal officer or other State officer shall serve written notice on the Commission of any civil action under subparagraph (A) prior to initiating such civil action. The notice shall include a copy of the complaint to be filed to initiate such civil action, except that if it is not feasible for the State to provide such prior notice, the State shall provide such notice immediately upon instituting such civil action.

(C) Authority to intervene

Upon receiving the notice required by subparagraph (B), the Commission shall have the right--

(i) to intervene in the action;

(ii) upon so intervening, to be heard on all matters arising therein; and

(iii) to file petitions for appeal.

(D) Construction

For purposes of bringing any civil action under subparagraph (A), nothing in this paragraph shall prevent the chief legal officer or other State officer from exercising the powers conferred on that officer by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(E) Venue; service or process

(i) Venue

An action brought under subparagraph (A) shall be brought in a district court of the United States that meets applicable requirements relating to venue under section 1391 of Title 28.

(ii) Service of process

In an action brought under subparagraph (A)--

(I) process may be served without regard to the territorial limits of the district or of the State in which the action is instituted; and

(II) a person who participated in an alleged violation that is being litigated in the civil action may be joined in the civil action without regard to the residence of the person.

(7) Effect on other laws

This subsection does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a political subdivision of a State, or of an intelligence agency of the United States.

(8) Definitions

For purposes of this subsection:

(A) Caller identification information

The term "caller identification information" means information provided by a caller identification service regarding the telephone number of, or other information regarding the origination of, a call made using a voice service or a text message sent using a text messaging service.

(B) Caller identification service

The term "caller identification service" means any service or device designed to provide the user of the service or device with the telephone number of, or other information regarding the origination of, a call made using a voice service or a text message sent using a text messaging service. Such term includes automatic number identification services.

(C) Text message

The term "Text message"--

(i) means a message consisting of text, images, sounds, or other information that is transmitted to or from a device that is identified as the receiving or transmitting device by means of a 10-digit telephone number or N11 service code;

(ii) includes a short message service (commonly referred to as "SMS") message and a multimedia message service (commonly referred to as "MMS") message; and

(iii) does not include--

(I) a real-time, two-way voice or video communication; or

(II) a message sent over an IP-enabled messaging service to another user of the same messaging service, except a message described in clause (ii).

(D) Text messaging service

The term "text messaging service" means a service that enables the transmission or receipt of a text message, including a service provided as part of or in connection with a voice service.

(E) Voice service

The term "voice service"--

(i) means any service that is interconnected with the public switched telephone network and that furnishes voice communications to an end user using resources from the North American Numbering Plan or any successor to the North American Numbering Plan adopted by the Commission under section 251(e)(1); and

(ii) includes transmissions from a telephone facsimile machine, computer, or other device to a telephone facsimile machine.

(9) Limitation

Notwithstanding any other provision of this section, subsection (f) shall not apply to this subsection or to the regulations under this subsection.

(f) Effect on State law

(1) State law not preempted

Except for the standards prescribed under subsection (d) and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits--

(A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;

(B) the use of automatic telephone dialing systems;

(C) the use of artificial or prerecorded voice messages; or

(D) the making of telephone solicitations.

(2) State use of databases

If, pursuant to subsection (c)(3), the Commission requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such State.

(g) Actions by States

(1) Authority of States

Whenever the attorney general of a State, or an official or agency designated by a State, has reason to believe that any person has engaged or is engaging in a pattern or practice of telephone calls or other transmissions to residents of that State in violation of this section or the regulations prescribed under this section, the State may bring a civil action on behalf of its residents to enjoin such calls, an action to recover for actual monetary loss or receive $500 in damages for each violation, or both such actions. If the court finds the defendant willfully or knowingly violated such regulations, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under the preceding sentence.

(2) Exclusive jurisdiction of Federal courts

The district courts of the United States, the United States courts of any territory, and the District Court of the United States for the District of Columbia shall have exclusive jurisdiction over all civil actions brought under this subsection. Upon proper application, such courts shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding the defendant to comply with the provisions of this section or regulations prescribed under this section, including the requirement that the defendant take such action as is necessary to remove the danger of such violation. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

(3) Rights of Commission

The State shall serve prior written notice of any such civil action upon the Commission and provide the Commission with a copy of its complaint, except in any case where such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action. The Commission shall have the right (A) to intervene in the action, (B) upon so intervening, to be heard on all matters arising therein, and (C) to file petitions for appeal.

(4) Venue; service of process

Any civil action brought under this subsection in a district court of the United States may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or wherein the violation occurred or is occurring, and process in such cases may be served in any district in which the defendant is an inhabitant or where the defendant may be found.

(5) Investigatory powers

For purposes of bringing any civil action under this subsection, nothing in this section shall prevent the attorney general of a State, or an official or agency designated by a State, from exercising the powers conferred on the attorney general or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(6) Effect on State court proceedings

Nothing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State.

(7) Limitation

Whenever the Commission has instituted a civil action for violation of regulations prescribed under this section, no State may, during the pendency of such action instituted by the Commission, subsequently institute a civil action against any defendant named in the Commission's complaint for any violation as alleged in the Commission's complaint.

(8) “Attorney general” defined

As used in this subsection, the term “attorney general” means the chief legal officer of a State.

(h) Annual report to Congress on robocalls and transmission of misleading or inaccurate caller identification information

(1) Report required

Not later than 1 year after December 30, 2019, and annually thereafter, the Commission, after consultation with the Federal Trade Commission, shall submit to Congress a report regarding enforcement by the Commission of subsections (b), (c), (d), and (e) during the preceding calendar year.

(2) Matters for inclusion

Each report required by paragraph (1) shall include the following:

(A) The number of complaints received by the Commission during each of the preceding 5 calendar years, for each of the following categories:

(i) Complaints alleging that a consumer received a call in violation of subsection (b) or (c).
(ii) Complaints alleging that a consumer received a call in violation of the standards prescribed under subsection (d).

(iii) Complaints alleging that a consumer received a call in connection with which misleading or inaccurate caller identification information was transmitted in violation of subsection (e).

(B) The number of citations issued by the Commission pursuant to section 503(b) of this title during the preceding calendar year to enforce subsection (d), and details of each such citation.

(C) The number of notices of apparent liability issued by the Commission pursuant to section 503(b) of this title during the preceding calendar year to enforce subsections (b), (c), (d), and (e), and details of each such notice including any proposed forfeiture amount.

(D) The number of final orders imposing forfeiture penalties issued pursuant to section 503(b) of this title during the preceding calendar year to enforce such subsections, and details of each such order including the forfeiture imposed.

(E) The amount of forfeiture penalties or criminal fines collected, during the preceding calendar year, by the Commission or the Attorney General for violations of such subsections, and details of each case in which such a forfeiture penalty or criminal fine was collected.

(F) Proposals for reducing the number of calls made in violation of such subsections.

(G) An analysis of the contribution by providers of interconnected VoIP service and non-interconnected VoIP service that discount high-volume, unlawful, short-duration calls to the total number of calls made in violation of such subsections, and recommendations on how to address such contribution in order to decrease the total number of calls made in violation of such subsections.

(3) No additional reporting required

The Commission shall prepare the report required by paragraph (1) without requiring the provision of additional information from providers of telecommunications service or voice service (as defined in section 227b(a) of this title).

(i) Information sharing

(1) In general

Not later than 18 months after December 30, 2019, the Commission shall prescribe regulations to establish a process that streamlines the ways in which a private entity may voluntarily share with the Commission information relating to--

(A) a call made or a text message sent in violation of subsection (b); or

(B) a call or text message for which misleading or inaccurate caller identification information was caused to be transmitted in violation of subsection (e).

(2) Text message defined

In this subsection, the term "text message" has the meaning given such term in subsection (e)(8).

(j) Robocall blocking service

(1) In general

Not later than 1 year after December 30, 2019, the Commission shall take a final agency action to ensure the robocall blocking services provided on an opt-out or opt-in basis pursuant to the Declaratory Ruling of the Commission in the matter of Advanced Methods to Target and Eliminate Unlawful Robocalls (CG Docket No. 17-59; FCC 19-51; adopted on June 6, 2019)--

(A) are provided with transparency and effective redress options for both--

(i) consumers; and

(ii) callers; and

(B) are provided with no additional line item charge to consumers and no additional charge to callers for resolving complaints related to erroneously blocked calls; and

(C) make all reasonable efforts to avoid blocking emergency public safety calls.

(2) Text message defined

In this subsection, the term "text message" has the meaning given such term in subsection (e)(8).

47 C.F.R. § 64.1200 (2019)

§ 64.1200 Delivery restrictions.

(a) No person or entity may:

(1) Except as provided in paragraph (a)(2) of this section, initiate any telephone call (other than a call made for emergency purposes or is made with the prior express consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice;

(i) To any emergency telephone line, including any 911 line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency;

(ii) To the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) To any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.

(iv) A person will not be liable for violating the prohibition in paragraph (a)(1)(iii) of this section when the call is placed to a wireless number that has been ported from wireline service and such call is a voice call; not knowingly made to a wireless number; and made within 15 days of the porting of the number from wireline to wireless service, provided the number is not already on the national do-not-call registry or caller's company-specific do-not-call list.

(2) Initiate, or cause to be initiated, any telephone call that includes or introduces an advertisement or constitutes telemarketing, using an automatic telephone dialing system or an artificial or prerecorded voice, to any of the lines or telephone numbers described in paragraphs (a)(1)(i) through (iii) of this section, other than a call made with the prior express written consent of the called party or the prior express consent of the called party when the call is made by or on behalf of a tax-exempt nonprofit organization, or a call that delivers a “health care” message made by, or on behalf of, a “covered entity” or its “business associate,” as those terms are defined in the HIPAA Privacy Rule, 45 CFR 160.103.

(3) Initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express written consent of the called party, unless the call;

(i) Is made for emergency purposes;

(ii) Is not made for a commercial purpose;

(iii) Is made for a commercial purpose but does not include or introduce an advertisement or constitute telemarketing;

(iv) Is made by or on behalf of a tax-exempt nonprofit organization; or

(v) Delivers a "health care" message made by, or on behalf of, a "covered entity" or its "business associate," as those terms are defined in the HIPAA Privacy Rule, 45 CFR 160.103.

(4) Use a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine, unless—

(i) The unsolicited advertisement is from a sender with an established business relationship, as defined in paragraph (f)(6) of this section, with the recipient; and

(ii) The sender obtained the number of the telephone facsimile machine through—

(A) The voluntary communication of such number by the recipient directly to the sender, within the context of such established business relationship; or

(B) A directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution. If a sender obtains the facsimile number from the recipient's own directory, advertisement, or Internet site, it will be presumed that the number was voluntarily made available for public distribution, unless such materials explicitly note that unsolicited advertisements are not accepted at the specified facsimile number. If a sender obtains the facsimile number from other sources, the sender must take reasonable steps to verify that the recipient agreed to make the number available for public distribution.

(C) This clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005 if the sender also possessed the facsimile machine number of the recipient before July 9, 2005. There shall be a rebuttable presumption that if a valid established business relationship was formed prior to July 9, 2005, the sender possessed the facsimile number prior to such date as well; and

(iii) The advertisement contains a notice that informs the recipient of the ability and means to avoid future unsolicited advertisements. A notice contained in an advertisement complies with the requirements under this paragraph only if—

(A) The notice is clear and conspicuous and on the first page of the advertisement;

(B) The notice states that the recipient may make a request to the sender of the advertisement not to send any future advertisements to a telephone facsimile machine or machines and that failure to comply, within 30 days, with such a request meeting the requirements under paragraph (a)(4)(v) of this section is unlawful;

(C) The notice sets forth the requirements for an opt-out request under paragraph (a)(4)(v) of this section;

(D) The notice includes—

(1) A domestic contact telephone number and facsimile machine number for the recipient to transmit such a request to the sender; and

(2) If neither the required telephone number nor facsimile machine number is a toll-free number, a separate cost-free mechanism including a Web site address or email address, for a recipient to transmit a request pursuant to such notice to the sender of the advertisement. A local telephone number also shall constitute a cost-free mechanism so long as recipients are local and will not incur any long distance or other separate charges for calls made to such number; and

(E) The telephone and facsimile numbers and cost-free mechanism identified in the notice must permit an individual or business to make an opt-out request 24 hours a day, 7 days a week.

(iv) A facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(4)(iii) of this section.

(v) A request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if—

(A) The request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;

(B) The request is made to the telephone number, facsimile number, Web site address or email address identified in the sender's facsimile advertisement; and

(C) The person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or

otherwise, to send such advertisements to such person at such telephone facsimile machine.

(vi) A sender that receives a request not to send future unsolicited advertisements that complies with paragraph (a)(4)(v) of this section must honor that request within the shortest reasonable time from the date of such request, not to exceed 30 days, and is prohibited from sending unsolicited advertisements to the recipient unless the recipient subsequently provides prior express invitation or permission to the sender. The recipient's opt-out request terminates the established business relationship exemption for purposes of sending future unsolicited advertisements. If such requests are recorded or maintained by a party other than the sender on whose behalf the unsolicited advertisement is sent, the sender will be liable for any failures to honor the opt-out request.

(vii) A facsimile broadcaster will be liable for violations of paragraph (a)(4) of this section, including the inclusion of opt-out notices on unsolicited advertisements, if it demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such facsimile transmissions.

(5) Use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(6) Disconnect an unanswered telemarketing call prior to at least 15 seconds or four (4) rings.

(7) Abandon more than three percent of all telemarketing calls that are answered live by a person, as measured over a 30–day period for a single calling campaign. If a single calling campaign exceeds a 30–day period, the abandonment rate shall be calculated separately for each successive 30–day period or portion thereof that such calling campaign continues. A call is “abandoned” if it is not connected to a live sales representative within two (2) seconds of the called person's completed greeting.

(i) Whenever a live sales representative is not available to speak with the person answering the call, within two (2) seconds after the called person's completed greeting, the telemarketer or the seller must provide:

(A) A prerecorded identification and opt-out message that is limited to disclosing that the call was for “telemarketing purposes” and states the name of the business, entity, or individual on whose behalf the call was placed, and a telephone number for such business, entity, or individual that permits the called person to make a do-not-call request during regular business hours for the duration of the telemarketing campaign; provided, that, such telephone number may not be a 900 number or any other number for which charges exceed local or long distance transmission charges, and

(B) An automated, interactive voice- and/or key press-activated opt-out mechanism that enables the called person to make a do-not-call request prior to terminating the call, including brief explanatory instructions on how to use such mechanism. When the called person elects to opt-out using such mechanism, the mechanism must automatically record the called person's number to the seller's do-not-call list and immediately terminate the call.

(ii) A call for telemarketing purposes that delivers an artificial or prerecorded voice message to a residential telephone line or to any of the lines or telephone numbers described in paragraphs (a)(1)(i) through (iii) of this section after the subscriber to such line has granted prior express written consent for the call to be made shall not be considered an abandoned call if the message begins within two (2) seconds of the called person's completed greeting.

(iii) The seller or telemarketer must maintain records establishing compliance with paragraph (a)(7) of this section.

(iv) Calls made by or on behalf of tax-exempt nonprofit organizations are not covered by this paragraph (a)(7).

(8) Use any technology to dial any telephone number for the purpose of determining whether the line is a facsimile or voice line.

(b) All artificial or prerecorded voice telephone messages shall:

(1) At the beginning of the message, state clearly the identity of the business, individual, or other entity that is responsible for initiating the call. If a business is responsible for initiating the call, the name under which the entity is registered to conduct business with the State Corporation Commission (or comparable regulatory authority) must be stated;

(2) During or after the message, state clearly the telephone number (other than that of the autodialer or prerecorded message player that placed the call) of such business, other entity, or individual. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges. For telemarketing messages to residential telephone subscribers, such telephone number must permit any individual to make a do-not-call request during regular business hours for the duration of the telemarketing campaign; and

(3) In every case where the artificial or prerecorded voice telephone message includes or introduces an advertisement or constitutes telemarketing and is delivered to a residential telephone line or any of the lines or telephone numbers described in paragraphs (a)(1)(i) through (iii), provide an automated, interactive voice- and/or key press-activated opt-out mechanism for the called person to make a do-not-call request, including brief explanatory instructions on how to use such mechanism, within two (2) seconds of

providing the identification information required in paragraph (b)(1) of this section. When the called person elects to opt out using such mechanism, the mechanism, must automatically record the called person's number to the seller's do-not-call list and immediately terminate the call. When the artificial or prerecorded voice telephone message is left on an answering machine or a voice mail service, such message must also provide a toll free number that enables the called person to call back at a later time and connect directly to the automated, interactive voice- and/or key press-activated opt-out mechanism and automatically record the called person's number to the seller's do-not-call list.

(c) No person or entity shall initiate any telephone solicitation to:

(1) Any residential telephone subscriber before the hour of 8 a.m. or after 9 p.m. (local time at the called party's location), or

(2) A residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry of persons who do not wish to receive telephone solicitations that is maintained by the Federal Government. Such do-not-call registrations must be honored indefinitely, or until the registration is cancelled by the consumer or the telephone number is removed by the database administrator. Any person or entity making telephone solicitations (or on whose behalf telephone solicitations are made) will not be liable for violating this requirement if:

(i) It can demonstrate that the violation is the result of error and that as part of its routine business practice, it meets the following standards:

(A) Written procedures. It has established and implemented written procedures to comply with the national do-not-call rules;

(B) Training of personnel. It has trained its personnel, and any entity assisting in its compliance, in procedures established pursuant to the national do-not-call rules;

(C) Recording. It has maintained and recorded a list of telephone numbers that the seller may not contact;

(D) Accessing the national do-not-call database. It uses a process to prevent telephone solicitations to any telephone number on any list established pursuant to the do-not-call rules, employing a version of the national do-not-call registry obtained from the administrator of the registry no more than 31 days prior to the date any call is made, and maintains records documenting this process.

Note to paragraph (c)(2)(i)(D): The requirement in paragraph 64.1200(c)(2)(i)(D) for persons or entities to employ a version of the national do-not-call registry obtained from the administrator no more than 31 days prior to the date any call is made is effective

January 1, 2005. Until January 1, 2005, persons or entities must continue to employ a version of the registry obtained from the administrator of the registry no more than three months prior to the date any call is made.

(E) Purchasing the national do-not-call database. It uses a process to ensure that it does not sell, rent, lease, purchase or use the national do-not-call database, or any part thereof, for any purpose except compliance with this section and any such state or federal law to prevent telephone solicitations to telephone numbers registered on the national database. It purchases access to the relevant do-not-call data from the administrator of the national database and does not participate in any arrangement to share the cost of accessing the national database, including any arrangement with telemarketers who may not divide the costs to access the national database among various client sellers; or

(ii) It has obtained the subscriber's prior express invitation or permission. Such permission must be evidenced by a signed, written agreement between the consumer and seller which states that the consumer agrees to be contacted by this seller and includes the telephone number to which the calls may be placed; or

(iii) The telemarketer making the call has a personal relationship with the recipient of the call.

(d) No person or entity shall initiate any call for telemarketing purposes to a residential telephone subscriber unless such person or entity has instituted procedures for maintaining a list of persons who request not to receive telemarketing calls made by or on behalf of that person or entity. The procedures instituted must meet the following minimum standards:

(1) Written policy. Persons or entities making calls for telemarketing purposes must have a written policy, available upon demand, for maintaining a do-not-call list.

(2) Training of personnel engaged in telemarketing. Personnel engaged in any aspect of telemarketing must be informed and trained in the existence and use of the do-not-call list.

(3) Recording, disclosure of do-not-call requests. If a person or entity making a call for telemarketing purposes (or on whose behalf such a call is made) receives a request from a residential telephone subscriber not to receive calls from that person or entity, the person or entity must record the request and place the subscriber's name, if provided, and telephone number on the do-not-call list at the time the request is made. Persons or entities making calls for telemarketing purposes (or on whose behalf such calls are made) must honor a residential subscriber's do-not-call request within a reasonable time from the date such request is made. This period may not exceed thirty days from the date of such request. If such requests are recorded or maintained by a party other than the person or entity on whose behalf the telemarketing call is made, the person or entity on whose behalf the telemarketing call is made will be liable for any failures to honor the do-not-

call request. A person or entity making a call for telemarketing purposes must obtain a consumer's prior express permission to share or forward the consumer's request not to be called to a party other than the person or entity on whose behalf a telemarketing call is made or an affiliated entity.

(4) Identification of sellers and telemarketers. A person or entity making a call for telemarketing purposes must provide the called party with the name of the individual caller, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which the person or entity may be contacted. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges.

(5) Affiliated persons or entities. In the absence of a specific request by the subscriber to the contrary, a residential subscriber's do-not-call request shall apply to the particular business entity making the call (or on whose behalf a call is made), and will not apply to affiliated entities unless the consumer reasonably would expect them to be included given the identification of the caller and the product being advertised.

(6) Maintenance of do-not-call lists. A person or entity making calls for telemarketing purposes must maintain a record of a consumer's request not to receive further telemarketing calls. A do-not-call request must be honored for 5 years from the time the request is made.

(7) Tax-exempt nonprofit organizations are not required to comply with 64.1200(d).

(e) The rules set forth in paragraph (c) and (d) of this section are applicable to any person or entity making telephone solicitations or telemarketing calls to wireless telephone numbers to the extent described in the Commission's Report and Order, CG Docket No. 02–278, FCC 03–153, "Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991."

(f) As used in this section:

(1) The term advertisement means any material advertising the commercial availability or quality of any property, goods, or services.

(2) The terms automatic telephone dialing system and autodialer mean equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers.

(3) The term clear and conspicuous means a notice that would be apparent to the reasonable consumer, separate and distinguishable from the advertising copy or other disclosures. With respect to facsimiles and for purposes of paragraph (a)(4)(iii)(A) of this section, the notice must be placed at either the top or bottom of the facsimile.

(4) The term emergency purposes means calls made necessary in any situation affecting the health and safety of consumers.

(5) The term established business relationship for purposes of telephone solicitations means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of the subscriber's purchase or transaction with the entity within the eighteen (18) months immediately preceding the date of the telephone call or on the basis of the subscriber's inquiry or application regarding products or services offered by the entity within the three months immediately preceding the date of the call, which relationship has not been previously terminated by either party.

(i) The subscriber's seller-specific do-not-call request, as set forth in paragraph (d)(3) of this section, terminates an established business relationship for purposes of telemarketing and telephone solicitation even if the subscriber continues to do business with the seller.

(ii) The subscriber's established business relationship with a particular business entity does not extend to affiliated entities unless the subscriber would reasonably expect them to be included given the nature and type of goods or services offered by the affiliate and the identity of the affiliate.

(6) The term established business relationship for purposes of paragraph (a)(4) of this section on the sending of facsimile advertisements means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.

(7) The term facsimile broadcaster means a person or entity that transmits messages to telephone facsimile machines on behalf of another person or entity for a fee.

(8) The term prior express written consent means an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered.

(i) The written agreement shall include a clear and conspicuous disclosure informing the person signing that:

(A) By executing the agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice; and

(B) The person is not required to sign the agreement (directly or indirectly), or agree to enter into such an agreement as a condition of purchasing any property, goods, or services.

(ii) The term "signature" shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

(9) The term seller means the person or entity on whose behalf a telephone call or message is initiated for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

(10) The term sender for purposes of paragraph (a)(4) of this section means the person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement.

(11) The term telemarketer means the person or entity that initiates a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

(12) The term telemarketing means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

(13) The term telephone facsimile machine means equipment which has the capacity to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(14) The term telephone solicitation means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message:

(i) To any person with that person's prior express invitation or permission;

(ii) To any person with whom the caller has an established business relationship; or

(iii) By or on behalf of a tax-exempt nonprofit organization.

(15) The term unsolicited advertisement means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

(16) The term personal relationship means any family member, friend, or acquaintance of the telemarketer making the call.

(g) Beginning January 1, 2004, common carriers shall:

(1) When providing local exchange service, provide an annual notice, via an insert in the subscriber's bill, of the right to give or revoke a notification of an objection to receiving telephone solicitations pursuant to the national do-not-call database maintained by the federal government and the methods by which such rights may be exercised by the subscriber. The notice must be clear and conspicuous and include, at a minimum, the Internet address and toll-free number that residential telephone subscribers may use to register on the national database.

(2) When providing service to any person or entity for the purpose of making telephone solicitations, make a one-time notification to such person or entity of the national do-not-call requirements, including, at a minimum, citation to 47 CFR 64.1200 and 16 CFR 310. Failure to receive such notification will not serve as a defense to any person or entity making telephone solicitations from violations of this section.

(h) The administrator of the national do-not-call registry that is maintained by the federal government shall make the telephone numbers in the database available to the States so that a State may use the telephone numbers that relate to such State as part of any database, list or listing system maintained by such State for the regulation of telephone solicitations.

(i) [Reserved]

(j) [Reserved]

(k) Voice service providers may block calls so that they do not reach a called party as follows:

(1) A provider may block a voice call when the subscriber to which the originating number is assigned has requested that calls purporting to originate from that number be blocked because the number is used for inbound calls only.

(2) A provider may block a voice call purporting to originate from any of the following:

(i) A North American Numbering Plan number that is not valid;

(ii) A valid North American Numbering Plan number that is not allocated to a provider by the North American Numbering Plan Administrator or the Pooling Administrator; and

(iii) A valid North American Numbering Plan number that is allocated to a provider by the North American Numbering Plan Administrator or Pooling Administrator, but is unused, so long as the provider blocking the calls is the allocatee of the number and confirms that the number is unused or has obtained

verification from the allocatee that the number is unused at the time of the blocking.

(3) A provider may not block a voice call under paragraph (k)(1) or (2) of this section if the call is an emergency call placed to 911.

(4) For purposes of this subsection, a provider may rely on Caller ID information to determine the purported originating number without regard to whether the call in fact originated from that number.